STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2002
v	No. 226187 Monroe Circuit Court
THOMAS WADE COATS, Defendant-Appellant.	LC No. 99-029961-FH

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for operating a vehicle while under the influence of intoxicating liquor (OUIL) and/or operating a vehicle with an unlawful bodily alcohol level (UBAL), third offense, MCL 257.625. The court sentenced defendant as a second habitual offender, MCL 769.10, to twenty-eight to ninety months' imprisonment. We affirm.

Defendant claims that comments made by the trial court judge resulted in a coerced verdict. We disagree.

At trial, the judge instructed the jury, dismissed two alternate jurors, and sent the remaining twelve jurors to deliberate at 3:32 p.m. The judge recalled the jury at 5:47 p.m., and told them that he might send them home until the following day. A juror interrupted the judge and stated that he would not be there the next day. After hearing this, the judge said:

> Oh, and we're down to twelve. Then I am going to do the following, send you back to the jury room to continue deliberations, because I can't do it with eleven. So you're back to that room then if you please.

Neither party objected, and the jury returned at 6:35 p.m. and announced it reached a verdict of guilty.

"Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, as well as the particular language used by the trial court, must be considered to determine whether the defendant was denied a fair trial." *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). Generally, a "court may impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefore and tell them it is their duty to try to agree; but should not give instructions having a tendency to

coerce the jury into agreeing on a verdict. *People v Malone*, 180 Mich App 347, 352-353; 447 NW2d 157 (1989), quoting *People v Strzempkowski*, 211 Mich 266, 268; 178 NW 771 (1920). Language in jury charges should contain no "pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion." *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984). This Court has noted that merely because a jury returned within one-half hour after an instruction did not, by itself, constitute any proof of coercion. *Id.*

In *Malone, supra*, the trial court judge made several comments to the jury regarding its deliberations, including:

> My experience has been--and I might be right, I can easily be wrong, that in most cases there's either a verdict shortly after dinner or it's hopeless, and so if shortly after dinner you have a verdict, fine. If not, I will be calling you in after a rather brief period of time and see if you people think that it might be a few more minutes or forever and if it's forever, we will just have to discharge you and send you home. If it's impossible to reach a verdict, that's unfortunate, we don't like to have that, but sometimes that's the way it is. [*Id*. at 350.]

In reviewing the defendant's claim of jury coercion, this Court ruled the judge's comments, taken as whole, were confusing and may have improperly implied that, if it did not reach a verdict that evening, the jury would be considered deadlocked and would be permanently discharged. *Id*. at 353. This Court also found it significant that the judge never told the jury that it could resume deliberations on the following Monday. *Id*. Ultimately, while the Court ruled that the verdict may have been coerced, the Court reversed the defendant's conviction based on the cumulative effect of numerous errors. *Id*., 362.

Here, the trial court judge's comment did not result in a coerced verdict. The language used by the judge contained no pressure or threats; rather, the trial court was simply responding to the situation, after a juror announced that he could not return the following day. *Holmes*, *supra*, at 749. The jury was aware that the court was attempting to accommodate a juror, and was not confused by the trial court's comments. *Malone, supra* at 347, 353. The trial court judge did not require the jury to deliberate until an unreasonable hour. The judge sent the jury to begin deliberations at 3:33 p.m. after a one-day trial, the trial court reviewed the situation at 5:47 p.m., and a verdict was reported at 6:35 p.m. Without more, the fact that the jury returned only forty-eight minutes after the instruction does not, by itself, constitute proof of coercion. *Holmes*, *supra*, at 749. We find that the trial court's comment did not result in a coerced verdict.

Defendant also alleges that the court erred when it stated that twelve jurors must decide the case, because MCR 6.410(A) states that the parties may stipulate to have the case decided by a jury of less than twelve jurors. However, MCR 6.410(A) also states that the trial court has the right to refuse such a stipulation in the interest of justice. According to MCR 6.410(A), the trial court need only state its reasons for refusing to accept the stipulation on the record. Because the trial court is so empowered by the court rules, and makes the final decision regarding the number of jurors, we find defendant's argument without merit.

Further, defendant contends that he received ineffective assistance of counsel because defense counsel did not move to suppress his confession to the police. According to defendant,

because he was intoxicated, his confession was involuntary and made pursuant to an invalid waiver of his *Miranda*[1] rights. Defendant further maintains that the police coerced his confession by threatening to prosecute his girlfriend, Natalie Shaw, for causing the accident.

To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). "As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate prejudice, a defendant must show "that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

"To properly preserve this issue defendant would have had to object to his counsel's performance in the court below and establish a record of facts pertaining to such allegations." *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). Because defendant failed to move for an evidentiary hearing below, *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973), our review of this issue is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 479; 540 NW2d 718 (1995). Our review of the record does not reveal that defense counsel's "performance fell below an objective standard of reasonableness" or that "but for errors of counsel, there was a reasonable probability of a different outcome." *Toma, supra* at 310-311.

"In determining whether defendant's confession was knowing, voluntary, and intelligent, we apply an objective standard and examine the totality of the circumstances." *Fike*, *supra* at 181. The relevant factors for consideration include:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before the magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

No single factor is determinative, and the absence or presence of any factor is not decisive in considering voluntariness. *People v Sexton*, 461 Mich 746, 753; 609 NW2d 822 (2000), citing *Cipriano, supra* at 334.

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602, 16 L Ed 2d 694 (1966).

The record indicates that defendant was intoxicated when state troopers arrived at the scene of the accident. Further, defendant's blood alcohol level was measured at .15 percent after he was taken to the police station. According to State Trooper Delman Putnam, prior to his arrest, defendant asserted that Shaw drove the truck into the ditch and that she left the scene on foot to find assistance. However, after Trooper Putnam told defendant that the police would have to question Shaw about the accident, defendant admitted that he was driving the truck when it drove into the ditch. After they took defendant into custody, the troopers read defendant his *Miranda* rights, defendant waived those rights, and the troopers conducted an interview at the police station. Trooper Putnam testified that, during the interview, defendant admitted that he drank several beers at a friend's house and then drove his truck into the ditch.

At trial, defendant testified that he was not driving the vehicle on the night of the incident and that he told the troopers several times that Shaw was driving the truck. Further, defendant maintained that he was cold, wet and tired after the accident and that the troopers questioned him several times about the incident but refused to believe his statement. According to defendant, he never actually admitted to driving the truck but, in light of the troopers' disbelief, he merely told them that, if Trooper Putnam believed he was the driver, then he was the driver. Shaw and a friend, Robert Nolff, also testified at trial that Shaw, not defendant, was driving the truck on the night of the incident.

Defendant has failed to overcome the presumption that defense counsel's decision not to request a suppression hearing constituted sound trial strategy, "an area in which this Court will not substitute its judgment for that of counsel." *Fike*, *supra* at 183. The record reflects that defendant maintained that he told the troopers several times that Shaw was driving the truck and that, after maintaining his innocence, he merely told Trooper Putnam that "whatever you say and if you say I was the driver, I was the driver, you don't believe anything I say anyway." Further, at trial, defendant and two witnesses testified that Shaw was driving the vehicle. Based on defendant's position at trial, that he repeatedly told the troopers that he was not the driver, defense counsel could have easily concluded that a pre-trial suppression hearing was unwarranted. Defense counsel could also have so concluded based on potential trial testimony from Shaw and Nolff, who claimed to personally witness defendant in the passenger seat of the truck.

Moreover, defense counsel could have alternatively concluded that a motion to suppress defendant's statements to police would have been futile. Though defendant may have been intoxicated at the time of his arrest, no evidence suggests he did not understand or appreciate his right to remain silent, his right to an attorney or that his statements might be used against him at trial. Not only did Trooper Putnam read defendant his *Miranda* rights, defendant has had sufficient previous experience with the police and to have been aware of his rights. Further, the record does not indicate that the police took advantage of defendant's condition or otherwise coerced him into confessing. Again, defendant testified at trial that, when questioned, he repeatedly told police that Shaw was driving the truck. Further, even if the troopers told defendant that they needed to question Shaw and that she might be arrested if she was driving, this does not amount to undue pressure, threat or coercion that would render defendant's statement involuntary.

Based on the circumstances surrounding defendant's confession, defense counsel could have reasonably concluded, that he would have been unsuccessful in filing a motion to suppress

defendant's statements. Indeed, the record before us reveals that defendant's statements were properly admitted at trial, "and trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *Fike, supra* at 182.

Were we to find that defense counsel's failure to seek suppression of defendant's statements constituted deficient performance, defendant has nonetheless failed to show that, absent this failure, the jury would have acquitted him. *Mitchell, supra* at 158. The prosecutor presented ample evidence that defendant was the driver of the truck when it ran into the ditch. An eyewitness, Jack Penwarden, testified that he saw a man behind the wheel of the truck immediately after the accident and that he saw the man attempt to drive out of the ditch. Further, Penwarden testified that he saw the man exit and reenter the truck, but saw no one else involved in the accident. The state troopers provided testimony corroborating Penwarden's observations. The troopers found a wallet lying on the ground near the bumper of the truck and saw signs that someone had exited the vehicle on the driver's side but no sign that anyone exited on the passenger's side. Moreover, the only personal items the troopers found in the truck belonged to defendant.

In sum, substantial direct and circumstantial evidence proved that defendant committed the crime. Accordingly, there is no reasonable likelihood that, if defense counsel attempted to suppress defendant's confession, the jury would have found defendant not guilty. Because defendant has failed to show that defense counsel's performance was deficient and that his errors prejudiced him so as to deny him a fair trial, defendant has failed to establish a viable claim of ineffective assistance of counsel. *Smith, supra* at 556.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell